

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of the Commission's) WT Docket No. 96-6
Rules to Permit Flexible)
Service Offerings in the)
Commercial Mobile Radio Services)

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REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T"), by its attorneys, hereby replies to the comments submitted in the above-captioned proceeding.^{1/}

I. THE COMMISSION HAS THE AUTHORITY TO CONTINUE TO REGULATE FIXED WIRELESS SERVICES AS CMRS

The overwhelming majority of commenters, including several incumbent local exchange carriers ("LECs"), manufacturers, and rural service providers, agree that the Commission has the authority to continue to regulate fixed wireless services as CMRS.^{2/} The few commenters who disagree^{3/} take a very narrow view of the words "fixed" and

^{1/} In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (rel. Aug. 1, 1996) ("Further Notice").

^{2/} See Comments of U S WEST at 3-5; Comments of BellSouth at 2; Comments of the Cellular Telecommunications Industry Association ("CTIA") at 4-6; Comments of the Personal Communications Industry Association ("PCIA") at 5; Comments of Motorola at 3-4; and Comments of the Rural Cellular Association ("RCA") at 4.

^{3/} See Comments of the Public Utilities Commission of Ohio ("PUCO"); Comments of the New York Department of Public Services ("NYDPS"); and Comments of the National Association of Regulatory Utility Commissioners ("NARUC").

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"mobile," which is directly contrary to the statutory definition of "mobile service" set forth in Section 3(27) of the Communications Act.^{4/} As AT&T and numerous commenters have demonstrated, there are several bases under which the Commission has jurisdiction to regulate fixed wireless services as CMRS.

First, as U S WEST argues, Congress has made clear that all personal communications services ("PCS"), whether fixed or mobile in nature, are to be defined as "mobile services" and regulated under Section 332.^{5/} Because the Commission has decided that PCS licensees may offer exclusively fixed services, the definition of mobile services requires that exclusively fixed services provided by PCS licensees fall within that definition for regulatory purposes.^{6/} In order to promote regulatory parity among CMRS providers, the Commission must also treat all other CMRS providers offering fixed services in the same manner.^{7/}

Second, Section 332's prohibition against entry barriers authorizes the Commission to regulate fixed wireless services as CMRS. If states were permitted to regulate wireless services on the basis of how much fixed service is offered, the resulting regulatory uncertainty as the mix of fixed and mobile service changes over time would act as a barrier

^{4/} 47 U.S.C. § 153(27). Only where Congress does not provide a specific, statutory definition should courts look to the ordinary, common sense meaning of a word. United States v. Johnson, 56 F.3d 947, 956-57 (8th Cir. 1995).

^{5/} Comments of U S WEST at 4.

^{6/} Id.

^{7/} Id.; see also Comments of CTIA at 7-8 ("Having determined that CMRS providers, including PCS licensees, may provide fixed services, the Commission has effectively found that fixed services offered by CMRS providers are 'mobile services,' and therefore subject to regulation as CMRS under Section 332.")

to entry, which is prohibited under both Sections 332 and 253 of the Communications Act.^{8/}

As the Rural Cellular Association points out, the Commission has recognized that "the construction of integrated networks, in which mobile, fixed wireless, wireline and cable facilities are blended into seamless networks, could be discouraged if individual CMRS licensees are subject to multiple layers of regulation."^{9/} The Commission may therefore exercise its jurisdiction under Sections 253 and 332 in order to prevent such multiple layers of regulation and the barrier to entry of fixed wireless services that they would impose.

Finally, the inseparability of the interstate and intrastate aspects of fixed wireless services supports federal jurisdiction over such services. PCS licenses are currently granted to serve multistate Major Trading Areas ("MTAs"), which makes it virtually impossible to identify whether customers are interstate or intrastate users of a network.^{10/} In addition, PCS operators would have to develop a mechanism that would allow them to track and isolate calls from fixed, as opposed to mobile, locations.^{11/} Given the inherent mobility of CMRS systems, development of such a tracking system would be extremely difficult.^{12/} Under Louisiana PSC, the Commission has authority to preempt conflicting state rules

^{8/} See Comments of Motorola at 7 (arguing that state regulation of the fixed service offerings of CMRS carriers constitutes a barrier to entry under Section 253(a) of the Communications Act, and therefore may be preempted by the Commission under Section 253(d)); Comments of AirTouch at 11 (stating that Section 253(e) "expressly reconfirms" the continued vitality of Section 332).

^{9/} Comments of the RCA at 4 (citing the Further Notice at ¶ 40).

^{10/} Comments of Omnipoint at 10; Comments of PCIA at 9-10.

^{11/} Comments of Omnipoint at 9.

^{12/} Comments of the Rural Telecommunications Group ("RTG") at 3-4.

where, as here, it is "not possible to separate the interstate and the intrastate components" of a federal regulation or "compliance with both federal and state law is in effect physically impossible."^{13/}

In sharp contrast to the wealth of statutory language and legislative history that supports the Commission's continued exercise of its authority over fixed wireless services, the state commenters provide no support for their conclusory statements that fixed wireless services are not CMRS and cannot be regulated as CMRS.^{14/} Nor have the state commenters supplied any policy justification for their argument that fixed wireless services should not be regulated as CMRS. In fact, no such policy justification exists. No CMRS licensee has yet rolled out a fixed application, and wireless services do not currently constitute replacements for wireline telephone service. While wireless technology is moving towards this goal, undue and multiple layers of regulation will stymie this technology before it has the opportunity to reach its full potential. In any event, a CMRS provider offering fixed wireless services would be the second, if not third or fourth, provider of local exchange services in a given area. The monopoly concerns that justify Title II regulation of LECs simply are not there.^{15/}

^{13/} Comments of PCIA at 7 (citing Louisiana Public Service Commission v. FCC, 476 U.S. 335, 368, 376 n.4 (1986)); see also Comments of Omnipoint at 9.

^{14/} Comments of NYDPS at 2; see also Comments of the PUCO at 3 ("the plain language of the Law does not, in general, include the concept of fixed wireless loops within the definition of mobile service and therefore, CMRS regulation does not apply").

^{15/} See Comments of the RTG at 6 (arguing that it is inappropriate to take outdated provisions of Title II regulation and impose them on a new breed of common carrier providers under the guise that it is necessary to level a very old playing field.)

To the extent a state becomes concerned that rates for fixed wireless services are unreasonable and need to be regulated, it may petition the Commission for authority to do so under the existing Section 332(c)(3) framework, just as it may with regard to any other CMRS service. States will not be deprived of appropriate jurisdiction over fixed wireless service providers that engage in "undue discriminatory pricing or pricing below cost"^{16/} just because those services are regulated as CMRS.

The Commission should likewise not be deterred by concerns about regulatory parity between wireless and wireline carriers.^{17/} "Regulatory parity" is a policy intended primarily to ensure comparable treatment of CMRS providers, not a regulatory straitjacket for all telecommunications carriers.^{18/} The Commission has previously recognized that CMRS providers may be treated differently than other carriers.^{19/} Congress, by establishing a federal regulatory scheme for CMRS providers, in fact mandated this different treatment. Congress recently further distinguished CMRS providers from other telecommunications carriers by excluding the former from the definition of "local exchange

^{16/} Comments of the PUCO at 5.

^{17/} Comments of Bell Atlantic NYNEX Mobile at 3; Comments of the National Telephone Cooperative Association at 3; Comments of the PUCO at 4.

^{18/} H.R. Rep. No. 103-111, at 259-260 (1993) (finding that disparities in the then-existing CMRS regulatory scheme could impede the continued growth and development of commercial mobile services).

^{19/} Comments of PCIA at 6 (citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers, CC Dockets 96-98, 95-185, First Report and Order, FCC 96-325 at ¶ 1025 (rel. Aug. 8, 1996) ("Local Competition Order").

carrier."^{20/} Even if a CMRS provider were classified as a LEC for a particular service, Congress also clearly distinguished between incumbent and other LECs.^{21/}

II. THE COMMISSION SHOULD REGULATE FIXED WIRELESS SERVICES AS CMRS UNTIL SUCH SERVICES ARE A REPLACEMENT FOR A SUBSTANTIAL PORTION OF LANDLINE EXCHANGE SERVICE WITHIN A STATE

The Commission clearly has both statutory authority and policy justification to regulate fixed wireless services as CMRS. Many commenters, however, object to the Commission's proposed rebuttable presumption as the method for exercising this authority.^{22/} Like AT&T, these commenters do not object to the presumption that fixed wireless services be regulated as CMRS, but are concerned that the case-by-case method of evaluating challenges to this presumption may be too unwieldy. This approach would not provide the level of regulatory certainty needed to encourage CMRS providers to offer new and innovative services and thus would lead to inefficient use of spectrum.^{23/} As the

^{20/} 47 U.S.C. § 153(26); see also Local Competition Order at ¶¶ 1004-1006.

^{21/} Comments of PCIA at 7 n.16 (pointing out the distinctions in 47 U.S.C. § 251 between the interconnection obligations of incumbent and other LECs).

^{22/} See Comments of U S WEST at 5-6; Comments of PCIA at 11-12; Comments of Omnipoint at 12; Comments of AirTouch at 4-6; Comments of Nextel at 2, 8; Comments of Motorola at 4.

^{23/} See Comments of Motorola at 4 ("The prospect of having to comply with the regulatory requirements of numerous different states, or with uncertain and potentially inconsistent federal rules, will act as a strong deterrent to the offering of fixed wireless services."); Comments of Omnipoint at 12 ("Under the Commission's proposal, the possibility of litigation seemingly attaches even when the . . . fixed service is first introduced and/or represents a tiny fraction of the total lines offered in the market, thus having a chilling effect on the mere introduction of such services."); Cf. Comments of Michelle Farquhar, Chief, Wireless Telecommunications Bureau, on 11/20/96 (emphasizing that administrative certainty is necessary to promote the efficient use of spectrum).

Commission has recognized, many CMRS providers will likely offer an integrated mix of fixed and mobile wireless services that may change over time.^{24/} Locking in a carrier's regulatory classification based on a particular mix of services offered at a particular point in time will destroy the flexibility needed to offer such a service. Before they offer a new service, CMRS providers need to know how that service will be regulated. If, as PacTel proposes, a fixed wireless service provider who installs one wireless loop is suddenly no longer regulated as a CMRS provider,^{25/} such providers will be discouraged from offering fixed wireless or integrated fixed and mobile services.

Instead, the Commission should adopt the substantial substitute test set forth in Section 332(c)(3), which is supported by most of the commenters.^{26/} Fixed wireless services would be regulated as CMRS until "such service is a replacement for land line telephone service for a substantial portion of the telephone land line exchange service within such State."^{27/} To make this determination, the Commission should require the state seeking authority to regulate the fixed service's rates "to provide such information as may be

^{24/} Further Notice at ¶¶ 40, 47.

^{25/} See Comments of Pacific Telesis Group ("PacTel") at 3.

^{26/} Comments of BellSouth at 2-3; Comments of PCIA at 13-14; Comments of Western Wireless at 3-5; Comments of Omnipoint at 12-13; Comments of Airtouch at 8; Comments of Nextel at 3-6; Comments of Motorola at 9; Comments of the RCA at 4.

^{27/} Comments of BellSouth at 2-3 (citing 47 U.S.C. § 332(c)). Cf. Comments of Western Wireless at 4-5 (suggesting that where fixed wireless service has replaced more than 30 percent of a LEC's access lines, the fixed wireless constitutes a "substantial" substitute.)

necessary to enable [it] to determine market conditions prevalent in the state and the range of basic telephone service alternatives available to consumers in the state."^{28/}

AT&T agrees that the substantial substitute test would better address "congressional concerns that CMRS operators be given a chance to establish a competitive foothold in telecommunications before they are regulated like a traditional LEC or incumbent LEC,"^{29/} and would be consistent with congressional intent "to foster the development of CMRS as a viable competitor to landline local exchange services."^{30/}

^{28/} Comments of BellSouth at 6 (citing Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1506 (1994)).

^{29/} Comments of Omnipoint at 13.

^{30/} Comments of AirTouch at 8.

CONCLUSION

For the reasons set forth above, there are compelling statutory and policy bases for regulating any fixed wireless service as CMRS until such time as the service constitutes a substitute for landline telephone exchange service in a substantial portion of a state.

Respectfully submitted,

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December 24, 1996

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